UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDWARD ANTHONY THROOP,

Petitioner,

v.

LARRY SMALL, Warden,

Respondent.

Civil No. 08cv1118 L (JMA)

ORDER:

(1) GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS, and

(2) DISMISSING PETITION WITHOUT PREJUDICE AND WITH LEAVE TO AMEND

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, together with a request to proceed in forma pauperis.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner has $.023 on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the $5.00 filing fee. Thus, the Court allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security.

BASIS FOR PETITION

Petitioner filed this action pursuant to 28 U.S.C. § 2241. Section 2241 allows persons to challenge the constitutionality of a final deportation order, federal custody or pretrial detention via habeas corpus under the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). See White v. Lambert, 370 F.3d 1002, 1006 (9th Cir. 2004); Rosas-Paniagua v. Reno, 76 F.Supp. 2d 1060, 1061 (N.D. Cal. 1999). Here, Petitioner is not challenging a final deportation order, but rather the Constitutionality of his gang classification and placement in segregated housing in state prison. (Pet. at 4.) Therefore, the Petition is not properly pursued under 28 U.S.C. § 2241.

PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. § 2254

Because Petitioner submitted his Petition as a writ of habeas corpus, the Court next considers whether the Petition should be construed as a petition under 28 U.S.C. § 2254. Section 2254 is properly understood as "in effect implement[ing] the general grant of habeas corpus authority found in § 2241 as long as the person is in custody pursuant to the *judgment* of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction." [citations omitted.] See White, 370 F.3d at 1006 (quoting Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000) (emphasis in original).

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a "judgment of a State court," and that he is in custody in "violation of the Constitution or laws or treaties of the United States." See 28 U.S.C. § 2254(a). Traditionally, "the writ of habeas corpus is limited to attacks upon the legality or duration of confinement." Crawford v. Bell, 599 F.2d 890, 891 (9th Cir. 1979). Further, a petition for writ of habeas corpus pursuant to § 2254 may be brought if a challenged proceeding will likely have an effect on the overall length of a prisoner's

sentence. Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir. 2003), cert. denied, 541 U.S. 1063 (2004); see Bostic v. Carlson, 884 F.2d 1267 (9th Cir.1989) (holding that habeas is proper where a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate his eligibility for parole) (citing McCollum v. Miller, 695 F.2d 1044, 1047 (7th Cir.1982)); Docken v. Chase, 393 F.3d 1024 (9th Cir. 2004) (holding that timing of parole review hearing could be challenged in habeas).

Petitioner is in state custody pursuant to a state court judgment and raises thirteen claims challenging the constitutionality of the validation proceedings in which he was designated as a gang associate, the non-disciplinary hearing which resulted in his indefinite confinement in the SHU, and the very fact of his indefinite confinement in the SHU. (Pet. 4-7, 8-17.) Petitioner does not claim that he will be required to serve additional time as a consequence of his confinement in the SHU. However, if the likely effect of the gang validation or his indefinite confinement in the SHU is that the overall length of Petitioner's sentence will increase, he can raise these claims in a writ of habeas corpus under 28 U.S.C. § 2254. See Ramirez, 334 F.3d at 858.

The Petition does not reveal the length or duration of Petitioner's sentence. However, Petitioner currently has a 28 U.S.C. § 1983 complaint pending in this Court in which Respondent has attached the Abstract of Judgment for Petitioner's commitment offense which states that Petitioner was sentenced to life without the possibility of parole on counts one and two. (See Throop v. Woodford, 06cv2376 JAH (NLS), Req. for Judicial Notice in Support of Motion for Judgment on the Pleadings, Exhibit A.) Under the Federal Rules of Evidence, a court may sua sponte take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Ev. 201(b)(2). It is generally agreed that courts can take judicial notice of court records. MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986). Accordingly, this Court takes judicial notice of the fact that Petitioner is sentenced to life without the possibility of parole as demonstrated in Exhibit A attached to Respondent's Request for Judicial Notice in Support of Judgement on the Pleadings in case number 06cv2376 JAH (NLS). Because Petitioner is serving a life sentence without the possibility of parole, the gang validation and his confinement in the SHU cannot increase the overall length of his sentence. Ramirez, 334 F.3d at 858. Therefore, a writ of habeas corpus under 28 U.S.C. 2254 cannot provide Petitioner with relief from his gang validation or indefinite confinement in the SHU.

CIVIL RIGHTS COMPLAINT 42 U.S.C. § 1983

Alternatively, Petitioner claims in Ground One that his indefinite confinement in the SHU infringes his liberty interest in "avoiding placement in supermax facilities for long durations." (Pet. at 4.) Petitioner further complains that he received his gang validation in "retaliation for exercising free speech protected by the First Amendment" because he complained after being physically abused by prison guards while he was at Calipatria State Prison. (Pet. at 10.) In addition, Petitioner claims that his Constitutional rights have been violated because he is currently an in-custody defendant in a criminal action pending in the Superior Court of Imperial County, and that "in order to be released from SHU [ever], Respondents demand Petitioner either debrief (become informant), or wait a minimum of 6 years until a set eligibility date when he may be reviewed for "inactive" status." (Pet. at 9.) Petitioner also asserts that during the validation process he was "treated disparately compared to other prisoners alleged to be involved in the same alleged prohibited activity, in violation of the Equal Protection clause" (Pet. at 16).

Challenges to conditions of confinement are brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. See Preiser, 411 U.S. at 488-500. A § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. Id. at 499; McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997). It appears that Petitioner challenges the conditions of his prison life, but not the fact or length of his custody. Therefore, Petitioner may choose to file a new complaint under 42 U.S.C. § 1983 or seek leave of court to file an amended complaint in the § 1983 case he currently has pending in this Court (06cv2376).

//

//

//

CONCLUSION AND ORDER

Based on the foregoing, the Court **GRANTS** Petitioner's request to proceed in forma pauperis. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee. Further, the Court **DISMISSES** this case without prejudice and with leave to amend. If Petitioner seeks to challenge his pretrial detention or other custody via a 28 U.S.C. § 2241, he must file an amended petition no later than **September 8, 2008.** If Petitioner seeks to challenge the fact or duration of his state court conviction, he must file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which will be given a new case number. If Petitioner wishes to challenge the conditions of his confinement, he must file a new complaint pursuant to 43 U.S.C. § 1983 or seek leave of court to file an amended complaint in the 1983 case he currently has pending in this Court. **THE CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A FIRST AMENDED 28 U.S.C. § 2241 FORM, A BLANK 28 U.S.C. § 2254 PETITION FORM AND A BLANK 42 U.S.C. § 1983 FORM**.

IT IS SO ORDERED.

DATED: July 9, 2008

M. James Lorenz
United States District Court Judge